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No. 88-99

In The

Supreme Court of the United States

October Term, 1988

RONALD A. WILLIAMS,

Petitioner,

vs.

DAVID A. HEPTING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant Certiorari in this case on the issue of absolute witness immunity from suit under 42 U.S.C. Section 1983 for allegedly perjurous testimony by a police officer at a preliminary hearing in a state criminal prosecution when no conflict exists between the Circuit Courts of Appeals with regard to this issue and this Court has just denied Certiorari on the identical question in *Holt v. Castaneda,* 108 S.Ct. 1275 (March 28, 1988).

2. Whether this Court should grant Certiorari in this case on the issue of whether the Court of Appeals properly applied the principles of *Younger v. Harris,* 401 U.S. 37 (1971), in requiring the district court to abstain from deciding those claims for damages under 42 U.S.C. Section 1983 that directly attack the validity of the underlying state criminal conviction pending the collateral exhaustion of the petitioner's appeal from that conviction.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Ronald A. Williams; and Respondents, David A. Hepting, Assistant District Attorney for Butler County, Pennsylvania; Chief Scarfo, Lieutenant J.F. Widdowson, Corporal Schueler, Officer Lewis and Officer Hartman, all of the Cranberry Township, Pennsylvania Police Department; and Robert Stewart, Gary Archer and Paul Bowser, Jr., a witness, juror and alternate juror, respectively, at Petitioner's state criminal trial.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Chief Scarfo, Lt. J.F. Widdowson, Cpl. Schueler, Officer Lewis, and Officer Hartman, respectfully pray that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit be denied in the above-entitled proceeding.

STATEMENT OF THE CASE

The respondents generally agree with the statement of the case presented in the Petition for Writ of Certiorari.

However, they wish to clarify certain matters. First, Williams' Complaint, in addition to alleging that witness Stewart committed perjury at his preliminary and suppression hearings, charges Officer Hartman with testifying falsely at Williams' preliminary hearing. (See Magistrate's Report and Recommendation, Appendix C to Petition for Writ of Certiorari, at 26a). Officer Hartman was granted absolute witness immunity by the District Court (Magistrate's Report and Recommendation, Appendix C at 29a; and Memorandum Order of U.S. District Judge Simmons, Appendix B at 21a), and all claims against Hartman stemming from this allegation were dismissed for failure to state a claim upon which relief could be granted.

Second, the Complaint filed by Williams brought numerous claims against the investigating police officers, ostensibly pursuant to 42 U.S.C. Sections 1981, 1983, 1985 and 1986. The Complaint alleged the existence of a grand conspiracy to convict Williams of murder and secure the imposition of the death penalty against him. The investigating police officers were alleged to have conspired to suppress exculpatory evidence, suborn witnesses, and influence the jury, among other things. All of Williams' conspiracy claims were dismissed pursuant to Rule 12(b)(6) for failing to plead any facts suggestive of the existence of a conspiracy. All of Williams' remaining claims against the police officers, save two, were likewise dis-

missed for failure to state claims upon which relief could be granted. The dismissal of these claims was affirmed, without comment or qualification, by the Court of Appeals. The petitioner has raised no challenge to the Court of Appeals affirmance of the dismissal of these claims in his Petition for Writ of Certiorari.

Finally, at page 5 of the Petition for Writ of Certiorari, the petitioner asserts that "The Court of Appeals remanded Williams' claims against *five* police officers and the assistant district attorney for failure to investigate . . . with directions that it amend its Order to provide that consideration of these issues . . . be stayed pending the outcome of Williams' state court proceedings." (emphasis added) This assertion is erroneous. The claim of failure to investigate potentially exculpatory leads now before this Court involves only three of the five investigating police officers—Chief Scarfo, Lt. Widdowson, and Cpl. Schueler. Officers Hartman and Lewis were not implicated by Williams in this aspect of his lawsuit. *See* 844 F.2d at 145; Slip Opinion at 16 (A 17a).

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari purports to present three questions: the applicability of witness immunity to pretrial proceedings; the applicability of prosecutorial immunity to allegedly illegal conduct; and the application of *Preiser v. Rodriguez,* 411 U.S. 475 (1973), to the facts of this case. Only two of these issues involve these respondents. The issue of prosecutorial immunity

does not concern these respondents and, therefore, will not be addressed in this Brief.

This Court recently denied review of the first question when it was presented in an identical manner in *Holt v. Castaneda,* 108 S.Ct. 1275 (March 28, 1988.) The second question is not presented accurately by the Petitioner and, when presented accurately, does not involve a substantial question of federal law which has not been settled by this Court.

Neither holding of the Court of Appeals is in conflict with decisions of other courts of appeals, nor with previous decisions of this court. This case, therefore, fails to satisfy any of the considerations governing review on Certiorari set out in Rule 17 of the Rules of this Court.

A. The Court of Appeals' Decision Applying Absolute Immunity To Testimony Given At A Preliminary Hearing In A State Criminal Prosecution Is Consistent With This Court's Decision In Briscoe v. LaHue, 460 U.S. 325 (1983), And The Decisions Of All Other Courts of Appeals That Have Considered The Issue.

Respondent Hartman is alleged to have prejured himself at the preliminary hearing in Williams' criminal prosecution in state court. Hartman is a police officer and was involved in the investigation of the charges against Williams. In reliance on this Court's opinion in *Briscoe v. LaHue,* 460 U.S. 325 (1983), both the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit determined that Hartman was entitled to absolute im-

munity from suit over his allegedly perjurous pretrial testimony.

In *Briscoe,* this Court held that Congress, in passing 42 U.S.C. Section 1983, did not abrogate the absolute immunity existing at common law for witnesses and "all persons—governmental or otherwise—who [are] intricate parts of the judicial process." 460 U.S. at 335. *Briscoe* further held that police officers who testify as witnesses at trial are entitled to absolute immunity from suit under Section 1983 for allegedly perjurous testimony. 460 U.S. at 342-344.

In his Petition for Writ of Certiorari, Williams asserts that this Court in *Briscoe* reserved the question of immunity for witnesses in pretrial proceedings and, therefore, that this case is not controlled by *Briscoe.* The Petitioner also contends that a split has developed among the Circuit Courts of Appeals over the applicability of witness immunity to testimony given in pretrial proceedings.

Respondents respectfully submit that the issue presented in this case—the applicability of witness immunity to preliminary and suppression hearings[1]—is clearly controlled by *Briscoe* and that no split of opinion exists among the Courts of Appeals with regard to this issue.

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1. Respondent Hartman is alleged to have presented perjured testimony at Williams' preliminary hearing. Another respondent in this action, Robert Stewart, is alleged to have lied at Williams' suppression hearing. This Brief will not directly address the allegations concerning Williams' suppression hearing. However, it is submitted that the argument for applying witness immunity to testimony before preliminary hearings applies with equal force to the same question with regard to suppression hearings.

The question reserved by this Court in *Briscoe* was not the applicability of witness immunity to pretrial proceedings, *in general* but the applicability of witness immunity to "pretrial proceedings *such as probable cause hearings* . . ." 460 U.S. at 329 n. 5. (emphasis added). This becomes clear when the language of footnote 5 is carefully reviewed:

> The Petition for Writ of Certiorari presents the following question: 'Whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under 42 U.S.C. section 1983.' The Petition does not raise the question of immunity from testimony at pretrial proceedings *such as probable cause hearings,* nor does petitioner's brief discuss whether the same immunity considerations that apply to trial testimony also apply to testimony at *probable cause hearings.* We therefore do not decide whether respondent LaHue is entitled to absolute immunity for allegedly false testimony at two *probable-cause hearings* regarding petitioner Briscoe.

460 U.S. at 329 n. 5. (emphasis added).

In *Briscoe,* this Court discussed the policy considerations underlying the common law principle of absolute witness immunity for testimony given at trial and determined that the same considerations warranted the grant of immunity in civil rights cases premised on allegedly prejurous trial testimony. The question left open by *Briscoe* was whether the same policy considerations required the extension of witness immunity to non-adversarial pretrial proceedings, such as probable-cause hearings. For instance, Justice Marshall observed in dissent that:

> [the] policy considerations applicable to testimony at a probable-cause hearing differ substantially from

> those relevant to testimony at trial. For instance, the absence of cross examination at probable cause hearings increases the risk that false testimony will go undetected.

460 U.S. at 352 n. 10 (Marshall, J. dissenting). The question presented in this case—the applicability of witness immunity to preliminary and suppression hearings—is fundamentally different from the one reserved by this Court in *Briscoe*. Moreover, the conflict of opinion to which petitioner points is over the applicability of witness immunity to grand jury proceedings. Again, a question fundamentally different from the one presented here.

The relevant distinctions between the preliminary hearing and the probable cause hearing focus on the absence of the procedural safeguards incident to judge-supervised adversarial criminal proceedings. As Judge Aldrich of the First Circuit has noted in *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984), probable cause determinations are made under conditions drastically different from formal trial proceedings. The determination of probable cause is made *ex parte* and solely on the basis of affidavits and, where appropriate, oral testimony, submitted by the requesting authority. Not only is there no opportunity for cross examination, but, in most instances, the person who is the subject of the probable cause hearing is completely unaware of its occurrence. Furthermore, the Sixth Amendment's guarantee of the right to counsel does not attach to the probable cause hearing because it proceeds the "initiation of adversary judicial criminal proceedings." *See United States v. Gouveia*, 467 U.S. 180 (1984); and *Brewer v. Williams*, 430 U.S. 387, *rehearing denied*, 431 U.S. 925 (1977).

Moreover, the conflict among the Circuit Courts to which the petitioner points is over another issue not presented in this case. The Petitioner points to the Fifth and Tenth Circuit Courts of Appeals' decisions in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir.) *modified on different grounds,* 744 F.2d 1131 (5th Cir. 1984); and *Anthony v. Baker,* 767 F.2d 657 (10th Cir. 1985), wherein those courts refused to extend witness immunity to allegedly falsified testimony before grand juries. Petitioner then compares these cases to the opinions of the Second, Sixth, Seventh and District of Columbia Courts of Appeals in *San Fillipo v. U.S. Trust Co. of New York,* 737 F.2d 246 (2d Cir. 1984), *cert. denied,* 470 U.S. 1035 (1985); *Macko v. Byron,* 760 F.2d 95 (6th Cir. 1985); *Kincaid v. Eberle,* 712 F.2d 1023 (7th Cir.), *cert. denied,* 464 U.S. 1018 (1983); and *Briggs v. Goodwin,* 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984), all of which grant witness immunity in the same circumstances, and asserts that this Court should grant certiorari to resolve this apparent conflict.

The split of opinion to which petitioner points is over the applicability of *Briscoe* to false testimony before grand juries. That issue is not presented in this case. Consequently, granting certiorari in this case will not allow this Court an opportunity to resolve any conflict that may exist among the circuits over the applicability of *Briscoe* to testimony before grand juries.

Proceedings before the grand jury are fundamentally different from a preliminary hearing. Grand juries lack the traditional procedural safeguards designed to ferret out untrustworthy testimony. As this Court recognized

in *United States v. Calandra,* 414 U.S. 338 (1974), the grand jury possesses a uniquely broad range of powers. It is not charged with deciding innocence or guilt; hence, the proceedings are not adversarial in nature. No cross-examination is permitted, prosecutors are not required to observe the evidentiary or procedural restrictions applicable to a criminal trial, and, since a grand jury witness (or subject of inquiry, for that matter) is not yet a defendant, he is not protected by the Sixth Amendment's guarantee of right to counsel. *United States v. Mandugano,* 425 U.S. 564, 581 (1976).

On the other hand, the pretrial proceeding involved in the instant case—the preliminary hearing—can fairly be characterized as adversarial, and is more akin to formal trial proceedings than the informal and *ex parte* probable cause hearing or grand jury. In Pennsylvania, for instance, criminal defendants have the absolute right to be present at their prelimiary hearing, to be represented by counsel, to cross examine the witnesses and to inspect the physical evidence offered against them, to offer witnesses and evidence on their own behalf, and to testify, should they so desire. Pa. Crim. Pro. Rule 141, 42 Pa. C.S.A.

The Ninth Circuit recently considered the exact issue presented here—the applicability of witness immunity to a preliminary hearing—in *Holt v. Castaneda,* 832 F.2d 123 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 1275 (1988). There, the Ninth Circuit Court held that:

> "[The] policy considerations applicable to adversarial pretrial proceedings, such as [preliminary hearings], are identical to the policy considerations relevant to testimony at trial on the merits. In both settings, the risk that false testimony will go undetected is min-

> imized by submitting the testimony to the crucible of the judicial process so that the fact finder may consider it, after cross examination, together with the other evidence in the case to determine where the truth lies. Quoting *Imbler v. Pachtman,* 424 U.S. 409, 440 (1976) (White J. concurring in judgment), as quoted in *Briscoe v. LaHue,* 460 U.S. at 1115. In adversarial pretrial proceedings as well as at trial, absolute witness immunity is essential if the truth seeking function of the proceeding is to be fully served."

Id, 832 F. 2d at 127.

The Ninth Circuit in *Holt v. Castaneda* held that absolute witness immunity applies to testimony given at a preliminary hearing. This Court was then presented with the opportunity to review this decision and denied certiorari, *Holt v. Castaneda,* 108 S.Ct. 1275 (March 28, 1988). Petitioner Williams has set forth no issues or facts that compel a different result here.

In summation, the question presented by petitioner in this case concerns the applicability of witness immunity to preliminary and suppression hearings. This question is directly controlled by this Court's previous holding in *Briscoe v. LaHue,* 460 U.S. 325 (1983). It is a question fundamentally different from the issue of the applicability of witness immunity to grand jury proceedings or probable-cause hearings. Therefore, the petitioner has presented no question worthy of resolution by this Court.

B. The Court of Appeals Properly Applied the Principles of Younger v. Harris, 401 U.S. 37 (1971) in Staying Those Claims Under 42 U.S.C. Section 1983 That Attack the Validity of Petitioner's State Court Conviction, in Light of the Pendency of Petitioner's Appeal From His Conviction Before the State Supreme Court in Which the Same Constitutional Issues Have Been Raised.

In his petition, Williams asserts that this case "presents a question of considerable practical importance: whether a civil rights plaintiff, prior to the final disposition of his criminal appeal in the state forum, can invoke the jurisdiction of a federal court by seeking relief on his civil damages claims which arise from the circumstances surrounding his state criminal conviction." Petition at 14.

The Petitioner inaccurately presents this issue as solely an exhaustion of remedies question and looks only to this Court's opinions in *Preiser v. Rodriguez,* 411 U.S. 475 (1973) and *Patsy v. Board of Regents*, 457 U.S. 496 (1982). By doing so, he overlooks the dispositive question presented: whether the Court of Appeals appropriately applied *Younger* abstention principles in staying Petitioner's claims until the disposition of his collateral state criminal appeal.

In *Preiser v. Rodriguez,* this Court held that a prisoner-plaintiff could not circumvent the exhaustion requirement of the federal habeas corpus statute by bringing an action under 42 U.S.C. Section 1983 that attacked the fact or duration of his confinement and that asked for immediate or accelerated release from imprisonment as relief. *Preiser* did not involve the situation where, as here, a

prisoner-plaintiff attacked his state *conviction* (and, hence, his continued confinement pursuant to that conviction), but asked only for damages as relief. In fact, this Court in *Preiser* expressly limited its holding to the situation presented in *Preiser:* "The respondents here [seek] no damages, but only equitable relief—restoration of their good time credit—and our holding today is limited to that situation." 411 U.S. at 493-494.

Petitioner relies heavily on the oft-cited dictim of this court in *Preiser* regarding the applicability of habeas corpus to claims for damages. *See* 411 U.S. at 494. However, the language cited by petitioner was dicta and, more importantly, is taken out-of-context. The language of the Court relied on by petitioner came in direct response to the argument by the respondents in *Preiser* that "confining state prisoners to federal habeas corpus, after first exhausting state remedies, could deprive those prisoners of any damage remedies to which they might be entitled for their mistreatment, since damages are not available in federal habeas corpus proceedings . . . " 411 U.S. at 493. In response to this argument, this Court stated:

> The answer to this contention is that the respondents here sought no damages, but only equitable relief—restoration of their good time credit—and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under

> the Civil Rights Act in Federal Court without any requirement of prior exhaustion of state remedies.

411 U.S. at 494.

The dictum from *Preiser* cited above is rooted in two well established legal principles. First, damages are not available as a remedy in habeas corpus. Second, 42 U.S.C. Section 1983 contains no requirement that a claimant exhaust available state judicial or administrative remedies as a pre-condition to invoking federal judicial relief. *Patsy v. Board of Regents,* 457 U.S. 496, 516 (1982). Both of these principles have continued vitality today. However, there rote application to the case at hand does not resolve the issues presented here.

Underlying this Court's decision in *Preiser v. Rodriguez, supra;* and *Wolff v. McDonnell,* 418 U.S. 539 (1974), was a concern for the "strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . " *Preiser v. Rodriguez,* 411 U.S. at 492. In *Preiser,* this concern for federal-state comity was manifested in the federal habeas corpus statute and its exhaustion of state remedies requirement. However, this was not the first, and has not been the only, situation in which concerns of comity have prompted federal courts to refrain from exercising their jurisdiction over claims brought by state criminal defendants.

Identical concerns for comity have been identified by this Court in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny, *see,* e.g., *Samuels v. Mackell,* 401 U.S. 66 (1971); *Steffel v. Thompson,* 415 U.S. 452 (1974); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Hicks v. Miran-*

da, 422 U.S. 332 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); and *Trainor v. Hernandez*, 431 U.S. 434 (1977).

Although this Court has not yet expressly held that *Younger* requires abstention in the context of a section 1983 damages action, *see Tower v. Glover*, 467 U.S. 914, 923 (1984); and *Juidice v. Vail*, 430 U.S. 327, 339 n. 16 (1977), several Circuit Courts have abstained where hearing such actions would have substantially disruptive effects upon ongoing state criminal proceedings, *see, Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986); *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986); *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1986); *Parkhurst v. State of Wyoming*, 641 F.2d 775 (10th Cir. 1981); *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *McCurry v. Allen*, 606 F.2d 795, 799 (8th Cir. 1979); *reversed on other grounds*, 449 U.S. 90 (1980); and *Martin v. Merola*, 532 F.2d 191, 194-195 (2d Cir. 1976), and this Court has given at least implicit approval to this practice in *Deakins v. Monaghan*, 108 S.Ct. 523 (1988).

In addition to those circuits that have expressly applied *Younger* to section 1983 actions for damages, other circuits have reached the same result by extending the exhaustion requirement enunciated in *Preiser v. Rodriquez* to cases attacking the fact or duration of confinement and seeking only money damages. *See*, e.g., *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981); *Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976), *adhered to on rehearing en banc*, 550 F.2d 343 (5th Cir. 1976).

Whether styled as the exercise of *Younger* abstention, or the application of the exhaustion requirement of

habeas corpus, these decisions are all motivated by the considerations of comity first laid out by this Court in *Younger v. Harris.* In all of these cases, "without a requirement that a prisoner first exhaust all available state court remedies, the federal court's resolution of the prisoner's claim for money damages would involve a determination of the validity of a state court conviction simultaneously under review in the state appellate courts." *Crump v. Lane,* 807 F.2d 1394, 1400 n. 5 (7th Cir. 1986). Such a result would undoubtedly run afoul of the comity concerns enunciated in *Younger.*

Whether termed "a limited exhaustion formula" or the exercise of *Younger* abstention, the Court of Appeals' stay of the within proceedings was clearly appropriate. The Petitioner's claims directly and unequivocally attack the validity of his state conviction. Ruling on these claims at this time would cast "a direct aspersion on the capabilities and good faith of the state appellate courts." *Huffman v. Pursue, Ltd.,* 420 U.S. at 608. The Court of Appeals deftly avoided this friction by staying Petitioner's claims until such time as he completes his state-court appeals. This Court should deny certiorari on this issue as the Court of Appeals action is clearly consistent with the prior rulings of this Court.

CONCLUSION

For the above stated reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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